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No. 88-1114

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARVIN AND GERALD LEBMAN, PETITIONERS

v.

AKTIEBOLAGET ELECTROLUX, ET AL.

REPRINTED COPY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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308

QUESTIONS PRESENTED

1. Whether, in this class action, class members who had not been notified of the certification of the class should have been given notice of the dismissal of the action.

2. Whether the statute of limitations for implied private rights of action under Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), 78n(e), and Rule 10b-5 under the Exchange Act, 17 C.F.R. 240.10b-5, should be drawn from state law or from an express limitations period found in the federal securities laws.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	3
Conclusion	20
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Adickes v. *Kress & Co.*, 398 U.S. 144 (1970) 19
Agency Holding Corp. v. *Malley-Duff & Associates, Inc.*, 107 S. Ct. 2759 (1987) 3, 6, 8, 9, 10, 11, 12, 17
American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974) 5
Armstrong v. *McAlpin*, 699 F.2d 79 (2d Cir. 1983) 6
Auto Workers v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) 5
Basic Inc. v. *Levinson*, 108 S. Ct. 978 (1988) 5, 10, 11
Bateman Eichler, Hill Richards, Inc. v. *Berner*, 472 U.S. 299 (1985) 10
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 5, 10, 11
Carothers v. *Rice*, 633 F.2d 7 (6th Cir. 1980), cert. denied, 450 U.S. 998 (1981) 6, 11
Chardon v. *Fumero Soto*, 462 U.S. 650 (1983) 3
Charney v. *Thomas*, 372 F.2d 97 (6th Cir. 1967) 6
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 19
Clinton Oil Co. Securities Lit., In re, [1977-1978] Fed. Sec. L. Rep. (CCH) ¶ 96,015 (D. Kan. 1977) 12
Data Access Systems Securities Litigation, In re, 843 F.2d 1537 (3d Cir.), cert. denied, 109 S. Ct. 131 (1988) 3, 7, 9, 10, 11
Davis v. *Birr, Wilson & Co.*, 839 F.2d 1369 (9th Cir. 1988) 6, 14
DelCostello v. *International Bhd. of Teamsters*, 462 U.S. 151 (1983) 6, 8, 9, 14, 19
Dirks v. *SEC*, 463 U.S. 646 (1983) 10

Cases—Continued: Page

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 5, 6, 16, 17
Forrestal Village, Inc. v. *Graham*, 551 F.2d 411 (D.C. Cir. 1977) 6
Friedlander v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986) 6, 9
General Builders Supply Co. v. *River Hill Coal Venture*, 796 F.2d 8 (1st Cir. 1986) 7
Herman & MacLean v. *Huddleston*, 459 U.S. 375 (1983).. 5, 6, 10, 11, 16, 17
Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) 5, 9, 14
Jensen v. *Snellings*, 841 F.2d 600 (5th Cir. 1988) 7
Kardon v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) 5
LaRosa Building Corp. v. *Equitable Life Assurance Society*, 542 F.2d 990 (7th Cir. 1976) 6
Loveridge v. *Dreagoux*, 678 F.2d 870 (10th Cir. 1982) 6
Maggio v. *Gerard Freezer & Ice Co.*, 824 F.2d 123 (1st Cir. 1987) 7
Marx v. *Centran Corp.*, 747 F.2d 1536 (6th Cir. 1984), cert. denied, 471 U.S. 1125 (1985) 6-7
McAllister v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958) 9
Merrill Lynch Pierce, Fenner & Smith v. *Curran*, 456 U.S. 353 (1982) 13
Morris v. *Stifel, Nicolaus & Co.*, 600 F.2d 139 (8th Cir. 1979) 6
Norris v. *Wirtz*, 818 F.2d 1329 (7th Cir.), cert. denied, 108 S. Ct. 329 (1987) 7, 14
Occidental Life Ins. Co. v. *EEOC*, 432 U.S. 355 (1977) .. 9
O'Hara v. *Kovens*, 625 F.2d 15 (4th Cir. 1980), cert. denied, 449 U.S. 1124 (1981) 6
Owens v. *Okure*, 109 S. Ct. 573 (1989) 15
Reed v. *United Transportation Union*, 109 S. Ct. 621 (1989) 8
Rodriguez de Quijas v. *Shearson/American Express, Inc.*, No. 88-385 (May 15, 1989) 19
Sante Fe Indus., Inc. v. *Green*, 430 U.S. 462 (1977) 10

Cases—Continued: Page

SEC v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963) 10
Superintendent of Insurance v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) 5
Teamsters Local 282 Pension Trust Fund v. *Angelos*, 815 F.2d 452 (7th Cir. 1987) 7
United Parcel Service, Inc. v. *Mitchell*, 451 U.S. 56 (1981) 9
United States v. *Mendenhall*, 446 U.S. 544 (1980) 19
Wachovia Bank & Trust Co. v. *National Student Marketing Corp.*, 650 F.2d 342 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981) 6
Wilson v. *Garcia*, 471 U.S. 261 (1985) 3, 8, 10
Wood v. *Combustion Engineering, Inc.*, 643 F.2d 339 (5th Cir. 1981) 2, 11
Youakim v. *Miller*, 425 U.S. 231 (1976) 19
Zola v. *Gordon*, 685 F. Supp. 354 (S.D.N.Y. 1988) 14

Statutes, regulations and rules:

Act of June 25, 1938, ch. 677, § 3, 52 Stat. 1076 15
Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704:
§ 5, 102 Stat. 4680-4681 (to be codified at 15 U.S.C. 78t-1) 4, 13
§ 20A, 15 U.S.C. 78t-1 ..... 4, 12, 14, 15, 16, 17, 18, 19
§ 20A(a), 15 U.S.C. 78t-1(a) 13
§ 20A(b)(4), 15 U.S.C. 78t-1(b)(4) 13, 14
§ 20A(d), 15 U.S.C. 78t-1(d) 14, 15, 16
§ 9, 102 Stat. 4684 (to be codified at 15 U.S.C. 78*o* Note) 19
Rules of Decision Act, 28 U.S.C. 1652 5
Securities Act of 1933, 15 U.S.C. 77(a) *et seq.*:
§ 2, 15 U.S.C. 77b 12
§ 11, 15 U.S.C. 77k 16
§ 12, 15 U.S.C. 77*l* 16
§ 13, 15 U.S.C. 77m 16
Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
§ 9, 15 U.S.C. 78i 15, 16

Statutes, regulations and rules – Continued: Page

§ 9(e), 15 U.S.C. 78i(e) 15
§ 10(b), 15 U.S.C. 78j(b) 2, 3, 5, 9, 16
§ 14(e), 15 U.S.C. 78n(e) 2, 9
§ 16(b), 15 U.S.C. 78p(b) 16
§ 18(c), 15 U.S.C. 78r(c) 15
§ 27, 15 U.S.C. 78aa 12
§ 29, 15 U.S.C. 78cc 15
§ 29(b), 15 U.S.C. 78cc(b) 15

17 C.F.R. 240.10b-5 ..... *passim*

Miscellaneous:

American Bar Ass'n, Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645 (1986) 7, 8, 14, 16, 17

Block & Barton, *Statute of Limitations in Private Actions Under Section 10b – A Proposal for Achieving Uniformity*, 7 Sec. Reg. L.J. 374 (1980) 7

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78 Cong. Rec. 8198-8201 (1934) 14

134 Cong. Rec.:
H7470 (daily ed. Sept. 13, 1988) 15
S17,220 (daily ed. Oct. 21, 1988) 15

Federal Securities Code (1980) 16

T. Hazen, *The Law of Securities Regulation* (1985) 7

H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. (1934) ... 14

H.R. Rep. No. 910, 100th Cong., 2d Sess. (1988) 13, 15

L. Loss, *Fundamentals of Securities Regulation* (2d ed. 1988) 7, 11, 16

Ruder & Cross, *Limitations on Civil Liability Under Rule 10b-5*, 1972 Duke L.J. 1125 7

Schulman, *Statutes of Limitation in 10b-5 Actions: Complication Added to Confusion*, 13 Wayne L. Rev. 635 (1967) 7

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners, residents of Texas, were stockholders of National Union, Inc., a Delaware Corporation. On June 20, 1974, Aktiebolaget Electrolux, a Swedish corporation, mailed tender offer materials to National Union shareholders offering to purchase all of the outstanding common stock of National Union at $28 per share. In response, approximately 92% of the outstanding common shares of National Union were tendered to Electrolux. Petitioners, however, did not accept the Electrolux offer and thus retained their National Union shares. On August 1, 1975, a subsidiary of Electrolux was merged with National Union pursuant to the short-form merger provisions of Delaware General Corporation Law. Pet. App. 2a-3a.

On August 5, 1975, Electrolux mailed a notice to the remaining holders of National Union common stock, including petitioners, advising them of the merger. The notice advised the

minority shareholders of their right to receive $28 per share or to seek an appraisal of their National Union stock pursuant to Delaware law. On December 22, 1975, petitioners and five other shareholders sought an appraisal in Delaware Chancery court. On November 3, 1978, an appraiser, following a hearing, found that as of August 1, 1975, the common stock of National Union was worth $24.85 per share. Pet. App. 2a-3a.

2. On July 28, 1978, prior to the appraisal, petitioners filed suit in the United States District Court for the Western District of Texas. They alleged that at the time of the tender offer, Electrolux had fraudulently concealed its intent to merge with National Union, and had then intentionally undervalued the shares during the merger, in violation of, *inter alia,* Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), 78n(e), and Rule 10b-5 under the Exchange Act, 17 C.F.R. 240.10b-5. Pet. App. 3a-4a. Petitioners sought to represent a class consisting of the 3,596 shareholders who had declined to tender their shares to Electrolux. Although the district court certified such a class, no notice of class certification was ever sent to the absent class members. Pet. App. 5a, 12a-16a.

In 1987, the district court dismissed the action, concluding that the statute of limitations had run.[1] The court found that the applicable statute of limitations was the two-year period for claims arising under the Texas general fraud statute. Applying that statute, the court determined that petitioners had notice of all of their claims no later than August 12, 1975, when they received the notice of merger mailed by Electrolux. Because petitioners had waited more than two years from that date before filing suit, the action was time-barred. Pet. App. 4a.

3. The court of appeals affirmed. The court noted that under its decision in *Wood* v. *Combustion Engineering, Inc.*, 643 F.2d 339 (1981), the district court had correctly chosen the Texas general fraud statute of limitations for claims arising

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[1] The delay in resolving this issue apparently resulted from protracted litigation over whether the court had personal jurisdiction of the foreign defendants. See Pet. 1.

under Section 10(b) of the Exchange Act and Rule 10b-5. Pet. App. 5a. The court of appeals rejected petitioners' suggestion that *Wood* should be reexamined in light of recent decisions of this Court, and that "either the Delaware or Texas three-year statute or a comparable rule from federal law" should be applied. Pet. App. 6a. The court held that its application of state law to Rule 10b-5 actions was compatible with the analysis used by this Court in *Wilson* v. *Garcia,* 471 U.S. 261 (1985), and *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 107 S. Ct. 2759 (1987). Pet. App. 5a-7a. The court also upheld the district court's conclusion that petitioners "had notice of all their claims on or before August 12, 1975, the day they received the notice of merger." Pet. App. 9a. In a footnote, the court noted that because the district court had dismissed the case before giving notice to the class members, the judgment "has no [e]ffect on the rights of those unnotified class members." *Id.* at 5a n.1.

DISCUSSION

" 'Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.' " *Wilson* v. *Garcia,* 471 U.S. at 266, quoting *Chardon* v. *Fumero Soto,* 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting). For decades, the courts of appeals have been divided over the correct statute of limitations to apply to implied private actions under Rule 10b-5. Although the courts of appeals until recently uniformly applied limitations periods drawn from the law of the forum state, disagreement abounded as to which type of state statute is most suitable. This state of affairs changed significantly in 1988, when the Third Circuit, sitting en banc, rejected the "absorption" of state statutes of limitations for 10b-5 purposes. Instead, the en banc court adopted a limitations period drawn from federal law. *In re Data Access Systems Securities Litigation,* 843 F.2d 1537, 1550 (3d Cir.), cert. denied, 109 S. Ct. 131 (1988).

In the wake of the *Data Access* decision, four principal options are available to courts for determining the appropriate

limitations periods for Rule 10b-5 actions, two drawn from state law and two from federal law. Looking to state law, courts could adopt the forum state's limitations period either for common law fraud or for statutory "blue sky" law actions. Looking alternatively to federal law, courts, following *Data Access,* could adopt the limitations periods for the express rights of action originally provided in the Exchange Act (which generally provide for a period of one year from discovery of the facts constituting the violation, but not later than three years after the violation), or they could apply the limitations period set forth in Section 20A of the Exchange Act, added by the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 5, 102 Stat. 4680-4681 (to be codified at 15 U.S.C. 78t-1) (which provides for a period of five years from the last unlawful transaction).

In our view, Rule 10b-5 actions would be better served by a uniform statute of limitations drawn from federal law. Federal securities litigation is inherently national in scope, varied in nature, and in need of a single, easily applied rule. The use of diverse state limitations periods cannot satisfy that goal. We thus agree with the *Data Access* court that the traditional approach of absorbing analogous state statutes of limitations is inappropriate in this context. Of the competing federal alternatives, however, we believe that the closer, more suitable analogy is found in the limitations period contained in Section 20A of the Exchange Act.

The question of the appropriate statute of limitations for implied private actions under Rule 10b-5 is an important question that warrants this Court's consideration. Nevertheless, this case presents a less than ideal vehicle for the Court's review. Because Section 20A was passed after the decision below was rendered, the court of appeals did not have an opportunity to consider that statute as a possible source for a limitations period drawn from federal law, and petitioners do not rely on it in their certiorari petition. Moreover, no other court of appeals has considered the use of the Section 20A period to limit Rule 10b-5 claims; initial consideration of this possibility in the circuit

courts may prove useful before this Court's resolution of the question. For these reasons, although the case otherwise appears properly to present the limitations question, we suggest that the petition be denied.[2]

1. Congress did not expressly create a private cause of action in the Exchange Act under Section 10(b); accordingly, there is no express limitations period for implied actions under Rule 10b-5.[3] In the absence of a specific federal statute of limitations to apply, "the federal courts have generally looked to local law as the source of a federal limitation period." *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 557 n.27 (1974); *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703-705 (1966); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946).[4]

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[2] The first question presented in the petition (Pet. i), whether notice should have been provided to absent class members of the dismissal of this action, does not warrant this Court's review. The court of appeals may have erred in not requiring such notice, because even though no notice of class certification had been provided, some class members may have been aware of the action and relied on it to protect their interests. But the error, if it was one, concerns a narrow and essentially fact-bound question not likely to recur. Moreover, the discussion of this issue in the unpublished opinion below is rather cryptic and seems unlikely to influence future class actions. Above all, there is no conflict with respect to this question.

[3] Section 10(b) of the Exchange Act and Rule 10b-5 do not create an express private right of action for persons injured through violations of those provisions. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 196 (1976); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 729-730 (1975). Shortly after the Securities and Exchange Commission adopted Rule 10b-5, however, a district court held that there is an implied right of action under Rule 10b-5. *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). Since that time, an implied right of action under Rule 10b-5 has been uniformly recognized by the courts and sanctioned by congressional acquiescence. *Basic Inc.* v. *Levinson*, 108 S. Ct. 978, 982-983 (1988). The existence of an implied right of action under Section 10(b) and Rule 10b-5 "is simply beyond peradventure." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 380-381 & n.10 (1983); *Basic Inc.* v. *Levinson*, 108 S. Ct. at 982; *Hochfelder*, 425 U.S. at 196; *Blue Chip Stamps*, 421 U.S. at 730; *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971).

[4] The Rules of Decision Act, 28 U.S.C. 1652, directs courts to apply state law in this setting, "unless 'a timeliness rule drawn from elsewhere in federal

Under the theory of "implied absorption" of state limitations periods into federal law, *ibid.*, courts in Rule 10b-5 actions have, until recently, routinely applied the state limitations period providing the most appropriate analogy to the federal cause of action.[5]

The reference to state law, however, has yielded confusing and inconsistent results. Through the early 1970s, courts favored the limitations periods applicable to common law fraud.[6] Although three courts of appeals continue to apply that approach,[7] more recently courts have gravitated toward borrowing the limitations periods of state blue sky statutes. Five courts of appeals now consistently apply blue sky law.[8] Two courts of appeals, however, apply both fraud and blue sky law, depending on the State within the circuit.[9] One court of appeals

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law should be applied.' " *Agency Holding Corp.*, 107 S. Ct. at 2762 (quoting *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983)).

[5] On two occasions, this Court has noted the prevailing practice of the lower courts to borrow the forum state's statutes of limitations in actions under Rule 10b-5. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 196 & n.29. *Herman & MacLean* v. *Huddleston*, 459 U.S. at 384 & n.18. In neither instance, however, did the Court pass on the appropriateness of that practice.

[6] See *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342, 348 & n.12 (D.C. Cir. 1980) (citing decisions as of 1971 from seven courts of appeals applying the fraud statute, while one court of appeals had applied the blue sky period), cert. denied, 452 U.S. 954 (1981).

[7] See *Armstrong* v. *McAlpin*, 699 F.2d 79 (2d Cir. 1983); *Davis* v. *Birr, Wilson & Co.*, 839 F.2d 1369 (9th Cir. 1988); *Loveridge* v. *Dreagoux*, 678 F.2d 870 (10th Cir. 1982).

[8] See, *O'Hara* v. *Kovens*, 625 F.2d 15 (4th Cir. 1980), cert. denied, 449 U.S. 1124 (1981); *LaRosa Building Corp.* v. *Equitable Life Assurance Society*, 542 F.2d 990 (7th Cir. 1976); *Morris* v. *Stifel, Nicolaus & Co.*, 600 F.2d 139 (8th Cir. 1979); *Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986); *Forrestal Village, Inc.* v. *Graham*, 551 F.2d 411 (D.C. Cir. 1977).

[9] For example, the Sixth Circuit applies the Kentucky three-year blue sky statute to Rule 10b-5 claims, but apples the six- and four-year common law fraud statutes, respectively, to actions governed by Michigan and Ohio law. See *Carothers* v. *Rice*, 633 F.2d 7 (1980) (Kentucky law), cert. denied, 450 U.S. 998 (1981); *Charney* v. *Thomas*, 372 F.2d 97 (1967) (Michigan law); *Marx*

applies the state personal injury statute.[10] And as discussed above, the Third Circuit has recently held that "the express limitations sections of the Securities Exchange Act of 1934 provide the preferable source of limitations borrowing" for Rule 10b-5. *Data Access,* 843 F.2d at 1550.[11]

Courts[12] and commentators[13] have criticized the unpredictable and inconsistent treatment of statutes of limitations issues under Rule 10b-5. In 1986, the American Bar Association's Committee on Federal Regulation of Securities concluded:

> Such disarray serves no public purpose. This uncertainty and lack of uniformity promote forum shopping by plaintiffs and result in wholly unjustified disparities in the rights of parties litigating identical claims in different states.

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v. *Centran Corp.*, 747 F.2d 1536 (1984) (Ohio law), cert. denied, 471 U.S. 1125 (1985). Likewise, the Fifth Circuit applies the fraud statute of limitations in actions governed by Texas law, as it did in this case, but applies the blue sky statute in actions governed by Louisiana law, see *Jensen* v. *Snellings,* 841 F.2d 600, 606 (1988).

[10] See *Maggio* v. *Gerard Freezer & Ice Co.*, 824 F.2d 123 (1st Cir. 1987); *General Builders Supply Co.* v. *River Hill Coal Venture,* 796 F.2d 8 (1st Cir. 1986).

[11] The appendix contains a table summarizing, by circuit, the differing approaches to the appropriate statute of limitations for Rule 10b-5. The appendix is based upon the American Bar Association's Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions,* 41 Bus. Law. 645, 659-661 (App. A) (1986), updated to reflect the current state of the law.

[12] See, *e.g.*, *Data Access,* 843 F.2d at 1539-1540; *Norris* v. *Wirtz,* 818 F.2d 1329, 1332 (7th Cir.), cert. denied, 108 S. Ct. 329 (1987); *Teamsters Local 282 Pension Trust Fund* v. *Angelos,* 815 F.2d 452, 455 (7th Cir. 1987).

[13] See, *e.g.*, L. Loss, *Fundamentals of Securities Regulation* 994-996 (2d. ed. 1988); Ruder & Cross, *Limitations on Civil Liability Under Rule 10b-5,* 1972 Duke L.J. 1125, 1142-1150; Bloomenthal, *Statutes of Limitations and the Securities Acts—Part I,* 7 Sec. & Fed. Corp. L. Rep. 17-24 (Mar. 1985); T. Hazen, *The Law of Securities Regulation* § 13.8 & n.2 (1985); Schulman, *Statutes of Limitation in 10b-5 Actions: Complication Added to Confusion,* 13 Wayne L. Rev. 635 (1967); Block & Barton, *Statute of Limitations in Private Actions Under Section 10(b)—A Proposal for Achieving Uniformity,* 7 Sec. Reg. L.J. 374 (1980).

> Neither plaintiffs nor defendants can determine their rights with any certainty. Vast amounts of judicial time and attorneys' fees are wasted.

Report of the Task Force on Statute of Limitations for Implied Actions, 41 Bus. Law. 645, 647 (1986) [hereinafter *ABA Task Force Report*].

2. This Court has recently clarified the standards for determining the appropriate statute of limitations when a federal statute is silent as to the applicable limitations period. See *Reed* v. *United Transportation Union,* 109 S. Ct. 621 (1989); *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc., supra; Wilson* v. *Garcia, supra; DelCostello* v. *International Bhd. of Teamsters,* 462 U.S. 151 (1983). The first step of the inquiry is to determine "whether all claims arising out of the federal statute 'should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.' " *Agency Holding Corp.,* 107 S. Ct. at 2762; *Reed,* 109 S. Ct. at 626-627. The characterization of a federal claim for this purpose is usually governed by federal law. *Agency Holding Corp.,* 107 S. Ct. at 2762; *Wilson* v. *Garcia,* 471 U.S. at 269-270.

The second step is the selection of a limitations period from state or federal law. *Agency Holding Corp.,* 107 S. Ct. at 2762. In view of the Court's historical borrowing of state law, it can generally be assumed "that Congress intended by its silence that we borrow state law." *Ibid.* However, " 'state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law,' " *ibid.,* in which case a federal statute may supply the better choice. "[R]esort to state law remains the norm for borrowing of limitations periods. Nevertheless, when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law." *DelCostello,* 462 U.S. at 171-172 (applying limitations period provided in

Section 10(b) of the National Labor Relations Act to Section 301/fair representation claims); see *Agency Holding Corp.*, 107 S. Ct. at 2762-2763 (applying Clayton Act limitations period to civil RICO); *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355 (1977) (refusing to apply a state statute of limitations to EEOC enforcement actions); *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958) (applying Jones Act statute of limitations to federal seaworthiness action); *Holmberg* v. *Armbrecht, supra* (applying federal doctrine of laches, rather than state limitations period, to equitable enforcement of federal right).[14]

a. The initial question is whether all Rule 10b-5 claims should be characterized in the same fashion for statute of limitations purposes. We believe that the approach of "color-matching," or choosing a period of limitations on a claim-by-claim basis, is inappropriate for Rule 10b-5 litigation. See *Data Access*, 843 F.2d at 1543 (rejecting "color matching" for Rule 10b-5 claims); *Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d at 1504 (same).

Like RICO and Section 1983, Rule 10b-5 " 'encompass[es] numerous and diverse topics and subtopics.' " *Agency Holding Corp.*, 107 S. Ct. at 2763. An action under Section 10(b) and

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[14] This Court has noted that the analysis outlined in the text may "make[ ] more sense as applied to a cause of action expressly created by Congress than as applied to one found by the courts to be implied in a general statutory scheme—especially when that general statutory scheme itself contains a federal statute of limitations for a related but separate form of relief." *DelCostello*, 462 U.S. at 158-159 n.12. See also *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 68 n.4 (1981) (Stewart, J., concurring). Whatever the general merits of this suggestion, however, the judicial implication of a right of action under Rule 10b-5 for over forty years, coupled with Congress's ratification of that development, persuades us that it is appropriate in this context to apply the analysis developed in *Reed*, *Agency Holding Corp.*, and *DelCostello*. Accordingly, we do not think that this case provides an occasion to decide whether implied causes of action generally deserve a different set of presumptions. Cf. *DelCostello*, 462 U.S. at 158-159 n.12.

We also believe that the analysis and conclusions we reach for Rule 10b-5 generally apply as well to the implied cause of action in the tender offer context under Section 14(e) of the Exchange Act, since both Rule 10b-5 and Section 14(e) prohibit fraudulent conduct in connection with securities transactions.

Rule 10b-5 "can be brought by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or deceptive device or contrivance.' " *Huddleston,* 459 U.S. at 382. Accordingly, "[S]ection 10(b) and Rule 10b-5 embrace a galaxy of actions." *Data Access,* 843 F.2d at 1543.[15] This diversity readily permits analogy to actions for common law fraud, breach of contract, breach of fiduciary duty, misappropriation, and violation of blue sky laws, among others. Attempting to matching the varied fact patterns and legal theories of each Rule 10b-5 claim would "inevitably breed[ ] uncertainty and time-consuming litigation." *Wilson,* 471 U.S. at 272. Consequently, as the Court concluded with respect to civil RICO claims in *Agency Holding Corp.,* Section 1983 claims in *Wilson,* and union free speech claims in *Reed,* Rule 10b-5 claims should be characterized uniformly.

b. The second inquiry is "whether a federal or state statute of limitations should be used." *Agency Holding Corp.,* 107 S. Ct. at 2762.

(1) As the deep division among the courts of appeals illustrates, there is no adequate state law analogy for Rule 10b-5 claims. Common law fraud doctrines were developed in contexts "light years away from the world of commercial transactions to which Rule 10b-5 is applicable." *Blue Chip Stamps,* 421 U.S. at 744-745; see *Basic,* 108 S. Ct. at 989-990; *SEC* v. *Capital Gains Research Bureau,* 375 U.S. 180, 194-195 (1963).

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[15] For example, Rule 10b-5 actions can be brought against the issuer of securities for false or misleading material public statements, see *Basic Inc.* v. *Levinson,* 108 S. Ct. 978, 981 (1988); against accountants, lawyers, or others involved in an offering of securities, see *Huddleston,* 459 U.S. at 378; against broker-dealers by customers fraudulently induced to purchase securities, see *Bateman Eichler, Hill Richards, Inc.* v. *Berner,* 472 U.S. 299, 301-303 (1985); against persons who trade in the securities markets while in possession of non-public information in breach of a fiduciary or other duty, cf. *Dirks* v. *SEC,* 463 U.S. 646, 653-654 (1983); against tippees of such persons who trade on inside information when they know, or should have known, of the breach, cf. *id.* at 660-664; against persons who manipulate the market for securities, cf. *Santa Fe Indus., Inc.* v. *Green,* 430 U.S. 462, 476-477 (1977), and in many other situations.

Indeed, one of Congress's paramount objectives in enacting Section 10(b) was to "rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct." *Herman & MacLean* v. *Huddleston,* 459 U.S. at 388-389. Thus, "[a]ctions under Rule 10b-5 are distinct from common-law deceit and misrepresentation claims, and are in part designed to add to the protections provided investors by the common law." *Basic,* 108 S. Ct. at 990 n.22 (citations omitted). Given these recognized differences, common law fraud provides an imperfect analogy for selecting a statute of limitations.

Likewise, the blue sky civil remedy provisions "come[ ] in a variety of shapes and sizes," frequently varying considerably from comparable federal remedies. L. Loss, *supra,* at 877-878. Blue sky law private actions, in contrast to private actions under Rule 10b-5, may not require scienter or reliance, and may provide relief only for purchasers, not sellers. See *Wood* v. *Combustion Engineering, Inc.,* 643 F.2d at 345-346. Moreover, many blue sky statutes provide only rescission rights, not the recovery of damages, and do not permit actions against brokers-dealers, attorneys, or accountants. See *Data Access,* 843 F.2d at 1543-1544. Consequently, even circuits that apply blue sky law in one state may turn away from it in other states because of particular features of those states' statutes. See *Carothers* v. *Rice,* 633 F.2d 7 (6th 1980), cert. denied, 450 U.S. 998 (1981). In view of the nuances and variation among the state securities laws, their limitations periods do not provide a promising source for a uniform, predictable rule.

More fundamentally, resort to state law in any form overlooks the fact that the securities markets regulated by the Exchange Act are inherently national in scope. See *Blue Chip Stamps,* 421 U.S. at 744-745. "Issues are usually marketed through underwriters and dealers, often including scores of investment banking and brokerage firms across the country." *Id.* at 758 (Powell, J., concurring). As with RICO, *Agency Holding Corp.,* 107 S. Ct. at 2766, the securities laws are built around a jurisdictional nexus to interstate commerce or the mails, and were in part enacted because no single state's laws were capable

of regulating the nation's capital markets. See 15 U.S.C. 77b. Moreover, the national nature of the securities exchanges often guarantees that "the statute of limitations of several States could govern any given * * * claim." *Agency Holding Corp.*, 107 S. Ct. at 2766. This creates not only the potential for forum shopping[16] and unjustified disparities in the treatment of similar cases, but also the possibility that a transferee court in multidistrict litigation may have to select different limitations periods for each of several consolidated actions involving the identical violation. See, *e.g.*, *In re Clinton Oil Co. Securities Lit.*, [1977-1978]. Fed. Sec. L. Rep. (CCH) ¶ 96,015 at 91,566-567 (D. Kan. 1977). Consequently, in this context, no less than in the civil RICO area, the borrowing of state law " 'virtually guarante[es] . . . complex and expensive litigation over what should be a straightforward matter.' " *Agency Holding Corp.*, 107 S. Ct. at 2766.

(2) If, as we believe, federal law offers a more appropriate source for a Rule 10b-5 limitations period, the next question that arises is which federal statute of limitations supplies the best analogy to the Rule 10b-5 action. Two alternatives suggest themselves. One, endorsed by the Third Circuit in *Data Access*, are the statutes of limitations contained in the Exchange Act applicable to provisions other than Section 10(b). But there is another alternative, namely, the new statute of limitations adopted by Congress in 1988 as part of Section 20A of the Exchange Act. In our view, Section 20A supplies the "closer analogy" (*Agency Holding Corp.*, 107 U.S. at 2764). Congress specifically passed this section to codify a private right of action for certain violations of Rule 10b-5. Application of the Section 20A limitations period would thus promote "[t]he federal policies at stake and the practicalities of litigation." *Agency Holding Corp.*, 107 S. Ct. at 2765.

In amending the securities laws in the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA), Congress

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[16] The broad venue provisions of Section 27 of the Exchange Act, 15 U.S.C. 78aa, which allow suit to be brought where the violation occurred or where "the defendant is found or is an inhabitant or transacts business," permit a choice of forum.

created an express private right of action on behalf of "contemporaneous" traders against "[a]ny person who violates any provision of this title or the rules or regulations thereunder" by trading while in possession of material, nonpublic information. Pub. L. No. 100-704, § 5, 102 Stat. 4681 (adding Section 20A(a) to the Exchange Act, to be codified at 15 U.S.C. 78t-1(a)). A principal purpose of this provision was "to overturn court cases which [had] precluded recovery for plaintiffs where the defendant's violation is premised upon the misappropriation theory." H.R. Rep. No. 910, 100th Cong., 2d Sess. 26 (1988). The express right of action provided by Section 20A includes a statute of limitations, which states: "No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation." Pub. L. No. 100-704, § 5, 102 Stat. 4681 (to be codified at 15 U.S.C. 78t-1(b)(4)).

Section 20A provides, for the first time, a statutory federal limitations period applicable to a private action based on a violation of Rule 10b-5. In passing ITSFEA, Congress legislated against the backdrop of judicial interpretations of Rule 10b-5 and, of course, is presumed to be familiar with that law. See, *e.g., Merrill Lynch Pierce, Fenner & Smith* v. *Curran,* 456 U.S. 353, 382 & n.66 (1982). Indeed, the legislative history manifests an awareness of developments under Rule 10b-5. The House Committee on Energy and Commerce reported that "Section 10(b) of the Exchange Act, along with Rule 10b-5 promulgated by the Commission, has been subject to the most extensive judicial interpretation. Those provisions broadly prohibit fraudulent practices in connection with the purchase or sale of any security, including trading while in possession of material, nonpublic information." H.R. Rep. No. 910, *supra,* at 8. The Committee went on to detail the holdings of this Court's insider trading decisions under the antifraud provisions of the securities laws. *Id.* at 8-10.

With that background in mind, Congress's selection of an appropriate statute of limitations for one type of Rule 10b-5 violation takes on particular significance. By this action, Congress itself " 'established a limitations period attuned to what it

viewed as the proper balance,' " *DelCostello*, 462 U.S. at 171, between, on the one hand, the interest in affording a remedy for investors injured by fraud, and, on the other, the goal of providing repose for companies, market professionals, and other potential defendants in Rule 10b-5 implied actions.[17]

That Congress legislated with respect to only one category of Rule 10b-5 claims does not mean that it intended a different limitations period to apply to other Rule 10b-5 actions. Section 20A(d) provides that "Nothing in this section [creating an express right of action] shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this title or the availability of any cause of action implied from a provision of this title" (to be codified at 15 U.S.C. 78t-1(d)). The legislative history suggests that Congress intended to "avoid * * * freezing the law or in any way restricting the potential rights of action which have been implied by the courts in this area," but instead to give "the courts leeway to develop such private rights of action in an expansive fashion in the

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[17] An important component of Section 20A is its ability to guarantee repose at a predictable time. While other statutes of limitations for federal causes of action have been held to be subject to equitable tolling, *Holmberg* v. *Armbrecht*, 327 U.S. at 395-396, we do not believe that equitable tolling would be appropriate under Section 20A. The language of Section 20A(b)(4) itself does not suggest that Congress intended there to be tolling under it, because it computes the timeliness of a claim "from the date of the last *transaction* that is the subject of the violation" (emphasis added). Moreover, the absence of tolling in private securities actions accords with the pattern of the express limitations periods under the Exchange Act. The judicial consensus is that the three year outer limit of the Exchange Act one-and-three year limitations period is an absolute bar and is not subject to equitable tolling. See, *e.g.*, *Zola* v. *Gordon*, 685 F. Supp. 354, 361 (S.D.N.Y. 1988) (citing cases). The legislative history of the Exchange Act confirms that Congress intended these periods to be absolute in order to ensure repose. See H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. 32, 36, 42 (1934); 78 Cong. Rec. 8198-8201 (1934). See also *Norris* v. *Wirtz*, 818 F.2d at 1332; *ABA Task Force Report*, *supra*, 41 Bus. Law. at 655 (finding it "inescapable * * * that Congress did not intend equitable tolling to apply in actions under the securities laws."); *Davis* v. *Birr, Wilson & Co.*, 839 F.2d 1369, 1374-1375 (9th Cir. 1988) (Aldisert, J., concurring). No question of equitable tolling is presented in this case, however, as petitioners brought suit within five years of all transactions alleged as the subject of the violation.

future." H.R. Rep. No. 910, *supra,* at 27. See also 134 Cong. Rec. H7,470 (daily ed. Sept. 13, 1988) (remarks of Rep. Lent); *id.* at S17,220 (daily ed. Oct. 21, 1988) (remarks of Sen. Garn). Thus, Congress in ITSFEA clearly signaled its intent to continue to allow courts to develop the incidents of the law governing implied rights of action such as that recognized under Rule 10b-5, including of course the selection of the most appropriate statute of limitations.

The practicalities of litigation also support application of the Section 20A limitations period to all Rule 10b-5 actions. In many cases there would be no difficulty in distinguishing between an insider trading case and some other type of Rule 10b-5 violation. In other cases, however, the parties could readily recast a claim as either one or the other (indeed, this may be such a case). If one sort of Rule 10b-5 action is governed by Section 20A(d)'s limitations period, while another is limited differently, then parties will have an incentive to engage in "artful pleading" in the hopes of "persuad[ing] the court that the facts and legal theories of a particular * * * claim" fall under whichever period of limitations is longer. *Owens* v. *Okure,* 109 S. Ct. 573, 576 (1989) (criticizing practice under Section 1983 prior to *Wilson* v. *Garcia*). Courts would also be called upon to wrestle with these characterization questions, reducing much of the benefit of having a uniform federal limitations period. This the overburdened judiciary does not need.

(3) The principal competing federal alternative to Section 20A is the one-and-three year limitations period applicable to express causes of action under the Exchange Act.[18] This alter-

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[18] The Exchange Act contains such statutes of limitations for the express rights of action it creates under Sections 9, 18, and 29. Section 9(e), 15 U.S.C. 78i(e), addresses manipulation of security prices. Section 18(c), 15 U.S.C. 78r(c), creates liability for misleading statements in any application, report, or document filed with the Commission. Section 29(b), 15 U.S.C. 78cc(b), permits rescission of certain purchases or sales of a security in violation of the Exchange Act or rules thereunder (and provides a limitations period for certain of those actions). (The limitations period for the latter section was added in 1938, Act of June 25, 1938, ch. 677, § 3, 52 Stat. 1076.) The sole exception to

native, which was endorsed by the Third Circuit in *Data Access,* has substantial surface appeal. Indeed, when an implied right of action under Rule 10b-5 was first recognized more than forty years ago, the selection of those limitations periods rather than state law arguably would have been the better solution. See, *e.g.,* L. Loss, *supra,* at 995-996. For several reasons, however, we do not believe that, in the present day, the one-and-three approach represents the best solution.

First, the relatively short Exchange Act statutes of limitations were devised for remedies that, in general, gave plaintiffs certain litigation advantages that they do not enjoy under Rule 10b-5. See, *e.g., Hochfelder,* 425 U.S. at 207-210 (noting that liability for negligence exists under several express causes of action, in contrast to requirement of *scienter* under Section 10(b)); *Huddleston,* 459 U.S. at 384 & n.18 (same).[19] The distinctions between the Rule 10b-5 right of action and the various express actions counsel against mechanically extending their limitations periods to Rule 10b-5. Moreover, because these periods are shorter than most state statutes currently being applied, see *Hochfelder,* 425 U.S. at 210 n.29, and are considerably shorter than Section 20A(d), they would curtail investor protection against fraud, and create significant problems of retroactivity.[20]

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this one-and-three year pattern is Section 16(b), 15 U.S.C. 78p(b), which provides two years for an issuer, or a shareholder suing on its behalf, to recover, on a strict liability theory, "short swing" profits by directors, officers, or beneficial owners of more than 10 percent of a class of securities who purchase and sell their companies' securities within six months. See also Section 13 of the Securities Act of 1933, 15 U.S.C. 77m (providing one-and-three year statute of limitations for action under Sections 11 and 12).

[19] This generalization does not apply to Section 9, 15 U.S.C. 78i, which does require scienter.

[20] Perhaps for these reasons, the American Law Institute's proposed *Federal Securities Code* § 1727(b) (1980), would have provided a statute of limitations of one year from constructive discovery and *five* years from the violation for violations of the antifraud provisions. The *ABA Task Force Report, supra,* 41 Bus. Law. at 658, proposed "a compromise of two years from the date of discovery, with a four-year cutoff," although it believed that having some definite period was more important than the particular period chosen.

There is also a practical drawback, to which we alluded earlier, to selecting the Exchange Act periods for implied Rule 10b-5 claims. At best, those periods would only apply to those Rule 10b-5 claims not expressly covered by the new Section 20A. Application of the one-and-three period for some Rule 10b-5 claims but not others would thereby generate litigation over which limitations period governs a given claim.[21]

Finally, the force of arguments that the one-and-three system provides the best analogy to implied Rule 10b-5 actions has been diminished by the passage of time. It seems odd, fifty-five years after their enactment and forty-three years after recognition of a cause of action under Rule 10b-5, that the Exchange Act limitations periods should be lifted from their statutory context and applied for the first time to the present-day Rule 10b-5 action.[22] Any speculation that the 73d Congress would have intended to apply the one-and-three system to Rule 10b-5 claims founders by virtue of the fact that "there is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such [an implied] remedy." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 196. No matter how prescient, the 73d Congress could not possibly have anticipated the growth of Rule 10b-5 once a judicially-implied cause of action came into being. That Rule

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[21] The confusion that would necessarily result could make it more difficult for public issuers to readily "calculate their contingent liabilities," *Agency Holding Corp.*, 107 S. Ct. at 2764, for financial statement purposes, thereby possibly adversely affecting the accuracy of their disclosure. See *ABA Task Force Report, supra*, 41 Bus. Law. at 647.

[22] There is also cause for hesitation in applying the one-and-three year system in the fact that Congress, which is presumed to be aware that courts had not used those limitations periods for Rule 10b-5, has never legislatively "corrected" this situation (except insofar as it did so in enacting Section 20A). Cf. *Huddleston*, 459 U.S. at 385-386 (noting that Congress extensively revised the federal securities laws in 1975, by which time "federal courts had consistently and routinely permitted a plaintiff to proceed under § 10(b) even where express remedies under § 11 or other provisions were available. In light of this well-established judicial interpretation, Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action.") (footnote omitted). These concerns are far weaker with respect to the application of Congress's recent enactment of a uniform federal limitations period for a category of Rule 10b-5 violations.

now overlaps in significant respects with the coverage of other express causes of action, and carries with it an articulated body of rules that touches all facets of the securities industry. We are unable to divine an adequate textual, historical, or policy justification for this Court to prefer a limitations system enacted by Congress half a century ago, with certain delimited rights of actions in mind, over a limitations period that Congress so recently enacted, with full knowledge of the wide swath cut by Rule 10b-5.

3. We believe that the question of the proper statute of limitations for Rule 10b-5 actions is important, and should be resolved by this Court on an appropriate occasion. If the only issue presented concerned the choice of an appropriate state limitations period, then further review might not be warranted: in those circumstances, the Court could at most impose uniformity in the method for selecting an appropriate state statute, but not uniformity in results, since the States differ widely among themselves in setting limitations periods for both fraud and blue sky violations. However, with a federal limitations period to consider, as one court of appeals, sitting en banc, has endorsed, this Court's review could result in genuine uniformity in all Rule 10b-5 actions. Whether *Data Access* correctly concluded that the usual presumption in favor of borrowing state limitations statutes should be overcome here, and if so which federal statute supplies the most appropriate analogy to Rule 10b-5 actions, are issues that deserve this Court's consideration.

Although we believe that the question is important, this case may not present a suitable vehicle for the Court's review. To be sure, the determination of the proper statute of limitations is purely a question of law, and the facts of this case allow for consideration, in a concrete context, of each of the four leading alternatives. Petitioners urge the application of state blue sky law (see Pet. 5), and could attack the court of appeals' judgment by arguing for application of Section 20A. Respondents prevailed below on the basis of state fraud law, and could support that judgment by arguing for the application of the Exchange Act one-and-three year system. Moreover, the question pre-

sented by the petition (Pet. i) is framed in a sufficiently broad fashion to encompass any of the four alternatives, including our suggestion that the limitations period be drawn from Section 20A.

There are, however, prudential considerations that counsel against immediate review of the issue. Section 20A was enacted on November 19, 1988, 102 Stat. 4680, more than three months after the court of appeals rendered its decision in this case. Tne application of Section 20A, therefore, obviously could not have been addressed below, and petitioners did not urge its application in their certiorari petition. Ordinarily, this Court does not decide new issues in these circumstances. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *United States* v. *Mendenhall*, 446 U.S. 544, 551-552 n.5 (1980); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). The fact that no other court of appeals has considered the effect of Section 20A also counsels in favor of restraint. Furthermore, issues of retroactivity are lurking in this case with respect to the application of Section 20A; those also have not been addressed by any court.[23] Finally, because statutes of limitations questions arise with some frequency, there will undoubtedly be occasions for the Court to visit the issue in the future. In consequence, although we believe the issue is an important one meriting the Court's consideration, we do not urge that certiorari be granted at this time.

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[23] We note that ITSFEA provides that "The amendments made by this Act * * * shall not apply to any actions occurring before the date of enactment of this Act." Pub. L. No. 100-704, § 9, 102 Stat. 4684 (to be codified at 15 U.S.C. 78*o* note). That section would not directly apply here, since the application of Section 20A to Rule 10b-5 would be a matter of "interstitial lawmaking," *DelCostello*, 462 U.S. at 172. Nevertheless, the effective date of the Act might be of relevance in determining whether to apply Section 20A to actions occurring before the date of its enactment. See *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, No. 88-385 (May 15, 1989), slip op. 8 (applying new principle regarding arbitrability of Securities Act claims retroactively).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX*

Circuit	*Theory*	*First Case*	*Most Recent Case*
1st	Personal Injury	*Janigan* v. *Taylor*, 344 F.2d 781 (1965) (applying Massachusetts' two-year statute)	*Maggio* v. *Gerard Freezer & Ice Co.*, 824 F.2d 123 (1987); *General Builders Supply Co.* v. *River Hill Coal Venture*, 796 F.2d 8 (1986) (same)
2d	Fraud	*Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (1951) (applying New York's two- and six-year fraud statute)	*Armstrong* v. *McAlpin*, 699 F.2d 79 (1983) (same)
3d	Federal One-and-Three	*In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (en banc), cert. denied, 109 S. Ct. 131 (1988) (applying Exchange Act one-and-three)	*Hill* v. *Equitable Trust Co.*, 851 F.2d 691 (1988) (same, retroactively), cert. denied, 109 S. Ct. 791 (1989)

* Based on the ABA's Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 659-661 (App. A) (1986), as updated to reflect the current state of the law. State limitations periods applied to Rule 10b-5 have been held to be subject to equitable tolling. See *ABA Task Force Report, supra*, 41 Bus. Law. at 654-655.

Circuit	*Theory*	*First Case*	*Most Recent Case*
4th	Blue sky	*Fox* v. *Kane Miller Corp.*, 542 F.2d 915 (1976) (applying Maryland's one-year blue sky statute)	*O'Hara* v. *Kovens*, 625 F.2d 15 (1980), cert. denied, 449 U.S. 1124 (1981) (same)
5th	Blue sky/ fraud	*O'Connell* v. *Economic Research Analysts*, 499 F.2d 994 (1974), cert. denied, 419 U.S. 1122 (1975) (applying Florida's blue sky law); *Azalea Meats, Inc.* v. *Muscat*, 386 F.2d 5 (1967) (applying Florida's three-year fraud statute)	*Jensen* v. *Snellings*, 841 F.2d 600 (1988) (applying Louisiana two-year blue sky statute); *Breen* v. *Centex Corp.*, 695 F.2d 907 (1983) (applying Texas's two-year fraud statute)
6th	Blue sky/ fraud	*Carothers* v. *Rice*, 633 F.2d 7 (1980) (applying Kentucky's three-year blue sky statute), cert. denied, 450 U.S. 998 (1981); *Charney* v. *Thomas*, 372 F.2d 97 (1967) (applying Michigan's six-year fraud period)	*Herm* v. *Stafford*, 663 F.2d 669 (1981) (Kentucky's three-year blue sky period); *Marx* v. *Centran Corp.*, 747 F.2d 1536 (1984) (applying Ohio's four-year fraud period), cert. denied, 471 U.S. 1125 (1985)

Circuit	*Theory*	*First Case*	*Most Recent Case*
7th	Blue sky	*La Rosa Building Corp.* v. *Equitable Life Assurance Society*, 542 F.2d 990 (1976) (applying Indiana two-year statute); *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123 (1972) (applying Illinois's three-year statute)	*Norris* v. *Wirtz*, 818 F.2d 1329 (same, Illinois law), cert. denied, 108 S. Ct. 329 (1987); *Cahill* v. *Ernst & Ernst*, 625 F.2d 151 (1980) (applying Wisconsin one-to-three year statute)
8th	Blue sky	*Vanderboom* v. *Sexton*, 422 F.2d 1233 (1970), cert. denied, 400 U.S. 852 (1970) (applying Arkansas's two-year statute	*Harris* v. *Union Elec. Co.*, 787 F.2d 355, cert. denied, 479 U.S. 823 (1986) (applying Missouri two-year statute)
9th	Fraud	*Fratt* v. *Robinson*, 203 F.2d 627 (1953) (applying Washington's three-year statute)	*Davis* v. *Birr, Wilson & Co.*, 839 F.2d 1369 (1988) (applying California three-year statute); *Volk* v. *D.A. Davidson & Co.*, 816 F.2d 1406 (1987) (applying Montana two-year statute)

Circuit	*Theory*	*First Case*	*Most Recent Case*
10th	Fraud	*De Haas* v. *Empire Petroleum Co.*, 435 F.2d 1223 (1971) (applying Colorado's three-year fraud period)	*Loveridge* v. *Dreagoux*, 678 F.2d 870 (1982) (applying Utah's three-year fraud statute)
11th	Blue sky	*Diamond* v. *Lamotte*, 709 F.2d 1419 (1983) applying Georgia's two-year statute	*Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (1986) (same); *Durham* v. *Business Management Ass'n* 847 F.2d 1505 (1988) (applying Alabama two-year statute)
D.C.	Blue sky	*Forrestal Village, Inc.* v. *Graham*, 551 F.2d 411 (1977) (applying D.C. two-year statute)	*Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342 (1980) (same, but not applied retroactively), cert. denied, 452 U.S. 954 (1981)

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